Associated Roofing & Sheet Metal Co., Inc. ***and*** **United Union of Roofers, Waterproofers and Allied Workers, Local Union 259, Petitioner.** Case 11-RC-4927

May 7, 1981

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted on November 13, 1980,[1] among the employees in the stipulated unit.[2] The tally of ballots showed that of approximately 47 eligible voters, 15 cast ballots for representation by Petitioner and 30 cast ballots against such representation. There were no challenged ballots.

On November 20, Petitioner filed timely objections to conduct affecting the results of the election. Following an investigation of the objections, the Acting Regional Director, on January 20, 1981, issued his Report on Objections, recommending that Petitioner's Objections 1(1), 1(2), and 7(a) be sustained, and that a second election be conducted.[3] The Board has reviewed the Acting Regional Director's report in light of the exceptions and brief, and hereby adopts his findings and recommendations, as modified herein.[4]

1. With respect to Objection 7(a), the Acting Regional Director found, and we agree, that the prepared text of a speech made by Employer President Ed Johnson to a captive audience meeting of employees the day before the election—in which he asserted his belief that "a vote for the Union . . . will be the same as a vote to put [the Employer] out of business and, with that, to do away with your jobs here"—constituted an attempt "[t]o convey to employees that unionization would lead to the closure of [the] business because it would be unable to secure work from other businesses who would not deal with a unionized Company" and was objectionable because it was "not a factually supported prediction based on available facts. Rather, the Employer [was] speculating as to the possible effect of unionization in an industry which is not heavily unionized." The Acting Regional Director correctly determined that the Employer's statement failed to meet the standards governing the permissibility of employer predictions as to "the precise effect" of unionization set out in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), where the Court ruled that such

> . . . prediction[s] must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

However, the Employer asserts that the Acting Regional Director did not discuss the Employer's asserted bases in the speech for its statement. We do so here. In claiming that the Employer would not be able to get work simply because it was unionized, Johnson told the employees that open-shop contractors in the area did "not want union men on their jobs," and supported this assertion by stating that the trend in North and South Carolina was toward nonunion shops, with "[o]nly 2 percent of all construction now going on in North Carolina . . . being done by union contractors," and by further stating that "there are only four general contractors located in this State who have unions anywhere and each of these is performing all of its North Carolina work with open-shop subsidiaries."

Assuming the accuracy of Johnson's figures, we find that they are not objective facts which demonstrate the probable consequences of unionization. The mere fact that unionization is at a low level in a particular industry does not establish or seriously indicate that employers in that industry refuse to do business with firms that are unionized. Of course, where a union tells the employees that it will demand a certain level of compensation, the employer may respond, if supported by objective facts, that that level would make it fatally noncompetitive; but that is not what was asserted here. Rather, there is a bald statement that unionization *per se* would make it impossible for the Employer to get business. Since this statement was not supported by objective facts, it constituted an improper threat to close if the employees voted for the Union. Such a threat clearly tainted the election. Consequently, we find, in agreement with the Acting Regional Director, that Objection 7(a) should be sustained. See, for example, *Rainbow Tours, Inc., d/b/a Rainbow Coaches*, 241 NLRB 589 (1979), enfd. 628 F.2d 1357 (9th Cir. 1980); *Marcus J. Lawrence Memorial Hospital*, 249 NLRB 608 (1980); *Hertzka & Knowles* v. *N.L.R.B.*, 503 F.2d 625, 627-628 (9th Cir. 1974), cert. denied 423 U.S. 875, enfg. 206 NLRB 191 (1973).

[1] All dates herein are 1980, unless otherwise specified.

[2] All working foremen, roofers, roofer's helpers, laborers, kettle operators, sheet metal workers, sheet metal helpers, truck drivers, and mechanics employed by the Employer, excluding all office clericals, sub-contractors and supervisors as defined in the Act.

[3] The Acting Regional Director also recommended that Objections 3, 5, 6, 8, and 9 be overruled and concluded that Objections 2, 4, and 7(b) raised substantial and material factual issues which could best be resolved at a hearing, if necessary.

[4] In the absence of exceptions thereto, we adopt, *pro forma*, the recommendations of the Acting Regional Director with respect to Objections 2, 3, 4, 5, 6, 7(b), 8, and 9. Since we order the holding of a second election based on the sustained objections discussed *infra*, no hearing will be necessary to consider the issues raised in Objections 2, 4, and 7(b).

2. With respect to Objection 1(2), the Acting Regional Director found Employer statements in a letter to employees dated October 30 to constitute "objectionable conduct serious enough to set aside the election." The letter stated, *inter alia,* that if the Union were voted in

> . . . the right and freedom of each employee to come in and settle matters personally would be gone. Every employee's affairs would then be handled by the persons who got themselves appointed as shop stewards and committeemen for the Union.

For the reasons discussed below, we find this statement to be an objectionable threat to withdraw unilaterally an existing benefit. Thus, we find it unnecessary to pass on the Acting Regional Director's view that the statement was a "misrepresentation involving a substantial departure from the truth [which] could reasonably be said to have a significant impact on the election."

The statement is not, as the Employer contends, a mere prediction of what the give and take of collective bargaining would produce. Rather, it is an improper threat by the Employer to terminate unilaterally the existing beneficial situation. See *Tipton Electric Company and Professional Furniture Company,* 242 NLRB 202 (1979), and cases cited therein at 207, enfd. 621 F.2d 890, 898 (8th Cir. 1980); *Ducane Heating Corporation,* 254 NLRB No. 30 (1981). Nor can it be argued that the letter simply stated the law with respect to direct dealing between employers and employees following the certification of a bargaining representative, since Section 9(a) expressly provides that:

> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Thus, while an employer, of course, may explain that union representation will mean that the union will be a participant in employer-employee relations generally, the employer cannot threaten to cut off unilaterally this legally permissible direct dealing with its employees in retaliation for selection of a union. Here, the Employer made just such a threat to terminate an existing beneficial situation. Accordingly, we sustain Objection 1(2).[5]

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

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[5] Since we set aside the election based upon Objections 7(a) and 1(2), we need not pass on the Acting Regional Director's findings with respect to Objection 1(1) that the Employer's statement regarding the rights of economic strikers constituted an objectionable misrepresentation of law.